IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 437.

LOUIS BARENFANGER, d/b/a BARENFANGER CONSTRUCTION COMPANY,
Petitioner,

vs

CHARLES LOUIS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

PETITIONER'S REPLY BRIEF.

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Now comes the Petitioner, Louis Barenfanger, d/b/a Barenfanger Construction Company, by John P. Wham of the Bar of this Court, of Counsel, herein, and presents this his Reply to Respondent's Brief.

I. Petitioner for his Reply to Respondent's Ground A, states:

Respondent is incorrect when he charges that the federal question was not timely raised. It is the action of the Illinois Supreme Court that deprived Petitioner of due process when it unexpectedly inserted words and mean-

ings into the Statute which the legislature had not provided.

The trial court correctly entered judgment for Petitioner. The Supreme Court correctly granted leave to appeal from an adverse ruling of the Appellate Court. At this point, inasmuch as the meaning of the Statute was involved, there was no reason for Petitioner to assume that the Supreme Court would not confine itself to its judicial powers in determining whether or not the final judgment rendered by the trial court should stand or be reversed.

Up to this point the judicial procedure in Illinois had not adversely affected Petitioner inasmuch as the final judgment in favor of Petitioner was subject to review by the highest court in the State in the same manner and on the same grounds as had the appeal gone directly to the Supreme Court from the trial court. The Appellate Court action meant nothing since the Supreme Court had granted leave to appeal.

It was only after the Supreme Court erroneously engaged in judicial legislation in passing on the meaning of the Statute and on the final judgment rendered by the trial court that the judicial system of Illinois failed to accord due process to Petitioner.

The Supreme Court was confronted with the direct proposition that it had denied Petitioner due process (See Petition for Rehearing—Transcript page 10). In denying the Petition for Rehearing, the Supreme Court held against Petitioner's position. The federal question had been properly raised by the Petitioner for a ruling in his Petition for Rehearing and was passed on by the Illinois Supreme Court when it denied the Petition for Rehearing as was the case in **Brinkerhoff-Faris v. Hill**, 281 U. S. 783, 50 S. Ct. 451, 74 L. ed. 1107, 1113, which is a leading

case concerning when a federal question has been timely raised. This Court held that a federal question raised for the first time on Petition for Rehearing in the highest court of a state is raised in time, when the question is presented by a construction placed upon a statute by such court in its decision at variance with a construction formerly adopted by it. This was held to be true even though no opinion had been rendered on the federal question presented in the Petition for Rehearing, and the petition had been summarily denied. The Brinkerhoff-Faris case is analogous to the case at hand.

Moreover, no decision of this court has placed Petitioner, or any other litigant under a duty to anticipate that the highest court in the state many render a decision which violates the Petitioner's rights to due process of law. The unwarranted judicial legislation engaged in by the Illinois Supreme Court could not have reasonably been foreseen by any exercise of clairvoyance prior to the time its decision was rendered on the 28th day of March, 1968.

This Court has repeatedly recognized that the presentation of a federal question is timely if made at the first real opportunity.

In **Saunders v. Shaw**, 37 S. Ct. 628, 244 U. S. 317, 61 L. ed. 1163, 1165, it was stated:

> "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the Plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The denial of rights given by the Fourteenth Amendment need not be by legislation . . . ."

Also see **Missouri ex rel. Missouri Insurance Company v. Gehner**, 50 S. Ct. 326, 281 U. S. 313, 74 L. ed. 870, 875.

Again in **New ex rel. Bryant v. Zimmerman**, 49 S. Ct. 61, 278 U. S. 63, 73 L. ed, 184, it was stated as follows:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented . . . it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

In the present case Petitioner could not have foreseen the unwarranted conduct of the Illinois Supreme Court in, (1) ignoring its former actions in similar cases, (2) failing to place any reliance on the terms of the Illinois Structural Work Act, and (3) revising the legislative enactment to include and create rights and liabilities clearly not intended and contemplated by the Illinois Legislature which passed the law in the first place.

Petitioner was clearly not aggrieved by any act of the trial court since that court upheld Petitioner's contention. The admissions and allegations made in Respondent's various complaints and pleadings in the trial court clearly established that the Illinois Structural Work Act was not involved and the trial court so held.

Nor could Petitioner have anticipated the clearly erroneous decision of the intermediate Appellate Court,

when it reversed the trial court and placed a wholly incorrect meaning on the Illinois Structural Work Act in direct conflict with the case of **Parizon v. Granite City Steel,** 71 Ill. App. 2d 53, 218 N. E. 2d 27, which case involved an identical question concerning the application of the Illinois Structural Work Act, and which case completely supported the position of Barenfanger in the instant case. (See Reply Appendix X, p. 13.)

The chronology of interrelated events surrounding the presentations and decisions of the Parizon and Barenfanger cases is helpful in understanding the position of Petitioner. Such chronology is as follows:

1. The Appellate Court of the Fifth District rendered the decision in **Parizon v. Granite City Steel Company,** 71 Ill. App. 2d 53, 218 N. E. 2d 27, on May 18, 1966. (See Reply Appendix X, p. 13.)

2. The Appellate Court of the Fifth District rendered its first decision in **Louis v. Barenfanger,** on September 14, 1966, in which opinion the Court expressly refused to follow the majority opinion in Parizon v. Granite City Steel Company, but agreed with the dissenting opinion in Parizon. (See Reply Appendix Y, p. 33.)

3. Petition for Leave to Appeal to the Supreme Court in the case of Parizon v. Granite City Steel Company, supra, was denied by the Supreme Court in the Parizon case January 20, 1967, and Motion to Reconsider said Petition for Leave to Appeal was denied by the Supreme Court on January 27, 1967. This was after the Supreme Court had ample knowledge of the original conflicting decision rendered in Barenfanger and thus placed its stamp of approval on Parizon and refused to follow Barenfanger.

4. After the Supreme Court's denial of Petition for Leave for appeal in Parizon, the Appellate Court of the

Fifth District granted Petition for Rehearing in the Barenfanger case on the 10th day of February, 1967.

5. On April 10, 1967 the Appellate Court filed its modified opinion (see appendix B, petition for Writ of Certiorari, p. 29) and rather than following the case of Parizon which had received the tacit approval of the Supreme Court of the State of Illinois at that point, completely ignored it and rendered its opinion diametrically in conflict with the holding of Parizon in the construction of the Statute.

6. Petition for Leave to Appeal to the Supreme Court of Illinois was timely filed and the Illinois Supreme Court granted leave to appeal.

7. The Opinion of the Illinois Supreme Court was entered on the 28th day of March, 1968, and a timely application for rehearing was denied on May 27, 1968.

From the above it is obvious that at the time of the Appellate Court's original decision (see Reply Appendix Y, p. 33), Petitioner had not been denied due process of law since that court awarded a rehearing after learning of the Supreme Court's action in the Parizon case. In fact, the Appellate Court had awaited the Supreme Court's action in Parizon before passing on Barenfanger's Petition for Rehearing, as was requested of them by Barenfanger at page 18 of the Petition for Rehearing which stated:

> "We further pray that the decision of this Honorable Court on this Petition for Rehearing be kept under advisement and stayed pending the determination of the Supreme Court in Parizon v. Granite City Steel in view of the conflicting decision in the instant case with that of the Court in the Parizon case. This would be beneficial to the plaintiff, the defendant and the courts in that the law applicable to this case

should be determined as definitely as possible before any further action is taken in the case."

It, therefore, was only reasonable for all parties concerned, including the courts, to assume that the Appellate Court, after being advised of the Illinois Supreme Court's action in Parizon denying leave to appeal, would then apply the law as established by Parizon. Who could have possibly anticipated the final opinion arrived at by the Appellate Court after it had given every indication of awaiting the final result of Parizon before determining whether or not to reverse the trial court and remand the case? Instead of following the law as announced by Parizon, the Appellate Court ignored the holding. (See Reply Appendix Y, p. 33.)

After the Appellate Court rendered its final decision, the very next step was the filing of the Petition for Leave to Appeal to the Supreme Court of the State of Illinois, wherein Petitioner, Barenfanger, stated as follows at pages 10 and 11 of the Petition for Leave to Appeal:

"The decision of the Appellate Court presents a substantial question of general importance to contractors in the State of Illinois inasmuch as the effect of this decision gives a completely erroneous construction to the Structural Work Act, greatly unsettles the law with reference thereto and **represents judicial legislation contrary to the obvious intention of the legislature**, and with no authority whatsoever to support the reasoning of the decision."

The Petition for Leave to Appeal to the Illinois Supreme Court also contained the following points, among others, relied upon by Petitioner for reversal:

Point 7 at page 4 of the Petition for Leave to Appeal, stated:

"The Structural Work Act cannot be added to by court action but must be left to the legislature."

Parizon v. Granite City Steel Company, 71 Ill. App. 2d 53, 70, 218 N. E. 2d 27.

Point 8 at page 5 of the Petition for Leave to Appeal, stated:

"Courts have no legislative powers and cannot inject provisions not found in a Statute however desirable or beneficial they may be."

Droste v. Kerner, 34 Ill. 2d 495, 504.

Further, Petitioner pointed out to the Illinois Supreme Court the language of Parizon as to which the Illinois Supreme Court had indicated its approval by denying a Petition in Parizon for Leave to Appeal. See pages 12-13 of Petition for Leave to Appeal wherein the quotation is set forth:

"... it is possible that the Structural Work Act, enacted as it was before the Workmen's Compensation Act, is a proper subject for legislative review and clarification, but we, as a court, **cannot** perform the functions that properly fall within purview of the legislature." (Emphasis supplied.)

Petitioner pointed out to the Illinois Supreme Court its own language in **Droste v. Kerner**, 34 Ill. 2d 495 at 504 (see p. 28 of Petitioner's Petition for Leave to Appeal):

"Courts have no legislative powers, and their sole function is to determine and, **within the constitutional limits of the legislative power**, give effect to the intention of the law making body. We will not **and cannot** inject provisions not found in a Statute, however desirable or beneficial they may be." (Emphasis supplied.)

In light of the foregoing, when this Petition for Leave to Appeal was granted by the Illinois Supreme Court, Petitioner had no reason to anticipate that the Illinois Supreme Court would indulge in forbidden judicial legislation and deprive Petitioner of due process. In fact, Barenfanger had every right to believe that the final judgment rendered by the trial court would be allowed to stand. Barenfanger was then at that point in the same position as he would have been had the appeal from the final judgment rendered by the trial court gone directly to the Supreme Court of the State of Illinois for review. He in effect was still in possession of a favorable decision and was not bound to anticipate that the grounds of the Supreme Court decision to be rendered on appeal would "supply a new and unexpected basis" for his claim "of the denial of a federal right". See **Great Northern R. Co., v. Sunburst Oil & Ref. Co.**, 287 U. S. 358-367, 77 L. ed. 360 at 368.

It was only after the Illinois Supreme Court in a divided opinion unexpectedly departed from its former position as indicated by the denial of Petition for Leave to Appeal in the Parizon case, that this Petitioner had any reason to expect that the judicial system of Illinois had deprived him of due process. Petitioner's Petition for Rehearing was timely filed and again reiterated the need for the court to observe fundamental limitations on the power of the judiciary.

This Court's attention is drawn to page 3 of Petitioner's Petition for Rehearing in the Supreme Court of Illinois, wherein Petitioner stated as follows:

> "In order for this fundamental and most important principle of Separation of Governmental Powers to stand uneroded, the Court must of necessity, carefully and objectively re-examine its own reasoning and

opinion wherein a Statute has been construed. Neither the Legislative nor Executive branch has the power to change the Court's erroneous decision so as to protect the litigant involved in the particular case. Therefore, a greater responsibility than ever rests upon the Court since it is in the unenviable position of being the sole judge of its own opinion in determining whether such opinion has transgressed the line of separation between sound judicial construction of a statute and unwarranted judicial legislation. Judicial legislation inevitably deprives a litigant of Due Process of Law.

The Court's conclusions as hereinafter noted reflect that the Court erroneously read into the statute words not found therein; and, consequently, Due Process under both the Illinois Constitution and the Fourteenth Amendment of the United States Constitution will be denied the appellant Barenfanger if this opinion is allowed to stand."

Petitioner cannot now reasonably be required to have foreseen the acts of the Supreme Court of Illinois in ignoring its own precedents, and disregarding fundamental limitations on judicial authority; and, when it became apparent that such was indeed the case, Petitioner made manifest his contentions as above quoted. Surely, Petitioner could not have been required to raise these issues any earlier or any more clearly, succinctly, or emphatically than he did.

The Petition for Rehearing in the Illinois Supreme Court was summarily denied. The failure of the Illinois Supreme Court to afford Petitioner an opportunity to know the theory upon which the Court decided that it was not obligated to follow fundamental and traditional limits on judicial power is not a matter within Petitioner's knowledge or control. Therefore, the fact that the Illinois

Supreme Court did not grant a rehearing and address itself to the fundamental questions presented by the Petition for Rehearing should not be grounds for denying this Petitioner his fundamental right to Due Process of Law. Indeed, if state Supreme Courts may escape review by this Court by rendering summary decisions on constitutional questions timely raised, then civil litigants can hold little or no hope for freedom from arbitrariness in state proceedings.

Respondent's argument is without merit; this Court does have jurisdiction of the federal question which was properly and timely raised.

II. Petitioner for his Reply to Respondent's Ground B, states:

Respondent is incorrect when he states that the decision of the Illinois Supreme Court is binding on the United States Supreme Court and not subject to review by it. We have recognized the distinction at pages 7 and 8 of the Petition for Writ of Certiorari between a situation involving the ordinary construction of a Statute and the complete departure by the Illinois Supreme Court from its judicial powers. If the United States Supreme Court cannot correct the abuse of Judicial Power by State Supreme Courts, then "Due Process" does not mean what it says.

III. Petitioner for his Reply to Respondent's Ground C, states:

Respondent overlooks the fact that a man's right to property is as subject to abuse of due process as is his right to liberty by unwarranted judicial legislation; and also overlooks the fact that the same words of the same Statute ought to mean the same thing whether the action be civil or criminal.

IV. Petitioner for his Reply to Respondent's Ground D, states:

A reading of the Statute and the Petition for Certiorari refutes the conclusions of Respondent set forth in item D. Petitioner refers the Court to the matters set forth in our Petition for Certiorari and in particular the plain terms of the Statute, the words of the majority Opinion and the words of the dissenting Opinion. They speak for themselves.

Respectfully submitted,

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